No. [illegible]

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

[illegible]

[illegible],

vs.

[illegible]

[illegible]

APPELLANT'S OPENING BRIEF

[illegible]

[illegible]

[illegible]

Attorneys for Appellant

[illegible]

Of Counsel

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings and Facts Disclosing Basis of Jurisdiction.

This action was instituted in the Superior Court of the State of California in and for the County of Los Angeles and thereafter, pursuant to order of said court [Tr. pp. 23-24] the cause was removed to the District Court of the United States, for the Southern District of California, Central Division. Doyle McDonald, plaintiff in the court below, is a citizen and resident of the State of California. [Tr. p. 16.] Bechtel-McCone Corporation (sued under its former corporate name, Bechtel-McCone-Parsons Corporation) one of the defendants in the court below, is a corporation organized and existing under the laws of the State of Nevada and is a citizen and resident of that State. [Tr. p. 16.] Compania Constructora Bechtel-Mc-

Cone, S. A. (sued under its former corporate name, Compania Constructora Bechtel-McCone-Parsons, S. A.) the other defendant in the court below and appellant herein is a corporation organized and existing under the laws of the Republic of Venezuela and is a citizen and resident of that Republic. [Tr. p. 17.] Doe One Company, a corporation, Doe Two Company, a co-partnership, Doe Three, Doe Four and Doe Five, joined in the complaint as alleged defendants, are purely fictitious parties having no real existence and it affirmatively appears from the face of the complaint and the exhibits attached thereto [Tr. pp. 2-14] that no cause of action was stated against said fictitious parties, that there are no persons other than Bechtel-McCone Corporation and Compania Constructora Bechtel-McCone, S. A. necessary or proper to be joined as defendants and that there are no persons other than plaintiff and said defendants having any relationship to or interest in the purported cause of action sued upon.

In his complaint plaintiff sought to recover $4,015 as damages for the alleged failure and refusal of defendants to perform the terms of a written contract of employment. The matter in controversy, therefore, exceeded the sum of $3,000, exclusive of interest and costs, with the requisite diversity of citizenship. [Tr. pp. 16-21.] The statutory basis for jurisdiction of the District Court is 28 United States Code, Sec. 41 (1), and the removal thereto was based upon 28 United States Code, Secs. 71 and 72.

Answer having been filed by the defendants in the District Court, trial was had upon all issues in the case. Thereafter the District Court entered its judgment [Tr. pp. 31-32] in favor of plaintiff and against defendant

Compania Constructora Bechtel-McCone, S. A. in the amount of $852.92 together with costs in the amount of $60.55.

Compania Constructora Bechtel-McCone, S. A. has appealed [Tr. p. 33] from the judgment. The statutory basis for the jurisdiction of this Court is 28 United States Code, Section 225 (a).

Statement of the Case.

During the year 1944 appellant was engaged in the construction of high-octane gasoline refinery facilities on Bahrein Island in the Persian Gulf for The Bahrein Petroleum Company, Limited. On May 28, 1944 appellant and appellee entered into a written employment agreement [Tr. pp. 43-49] whereby the former employed the latter as a boilermaker (or in such other capacity as appellant might from time to time require) in said construction work for a term of 18 months. The contract was subject to cancellation by either party upon giving the other one month's notice. [Tr. pp. 45-46.] The agreed salary was $450.00 per month.

J. Roy McAuliffe, as Project Manager, was in complete charge of the construction work on Bahrein Island for appellant. Directly under him were Harold Vessels, assistant project manager, and two general superintendents. Directly under the general superintendents were the various general foremen in charge of their respective crafts and among these Ed Gratz was the general boilermaker foreman. Under Gratz were three or four boilermaker foremen, including Leon Tam. Tam had a number of boilermakers working under his supervision numbering from 30 to 40 men, including Doyle McDonald, appellee

herein. Each boilermaker had a crew of Arab laborers assigned to him who did the manual work of handling materials and carrying tools for the boilermakers. The boilermaker foremen, including Tam, had no authority with respect to discharging boilermakers working under them, their sole authority in that regard being to take a man off the job and send him to the general boilermaker foreman with recommendations. The general boilermaker foreman had authority to discharge subject in all cases to the written approval of the Project Manager. [Tr. pp. 186-189.]

Appellee performed services pursuant to the employment agreement from on or about May 29, 1944, to on or about July 9, 1944. For approximately the first two weeks of that period he worked on the assembly of a bubble tower then in the course of construction as a part of the refinery facilities. For approximately the next two weeks he worked at setting the base of a smokestack located some distance away from the site of the bubble tower. He then returned to the bubble tower and continued working there until the afternoon of July 9, 1944, when he had an altercation with Leon Tam, his immediate foreman, which eventually led to this litigation. [Tr. pp. 54-63.]

The bubble tower assembly job referred to herein consisted of bringing together, fitting and permanently securing together, in a horizontal position on the ground, the several pre-fabricated cylindrical sections of the shell of the vessel. The sections were 12 feet in diameter, ranged in height from 16 to 20 feet and weighed approximately

20 tons each. In the course of assembly of the shell of the vessel a cradle was built in a line pointing directly to the foundation upon which the vessel would eventually be set. The base section would then be lifted into the cradle with a crane and set at the end of the cradle closest to the foundation. Then the next section would be lifted into the cradle into approximate juxtaposition with the base section and with the assistance of additional tools, discussed more particularly hereinafter, it would then be moved to within one-sixteenth of an inch from the base section and into exact alignment with it. The nearly adjoining ends of the sections would then be shaped as necessary to place them in exactly true position for joinder by welding. This process would be repeated with the remaining sections until the entire shell of the vessel was completely assembled and welded together in a horizontal position on the cradle. The duty of the boilermaker in this process was to cause the sections to be brought into exact alignment and to fit up the adjoining ends of the sections so that they were in correct position to be welded together. [Tr. pp. 189-191.]

Several different types of tools were used on this job to bring the ends of the tower sections into close enough proximity to each other to be welded together. The crane, jacks, keyplates, wedges, and turnbuckles were used in this process. [Tr. pp. 121-124, 190, 259, 75-80.] Appellee had refused to obey his foreman, Tam's, order to obtain and use turnbuckles in bringing the sections of this bubble tower into place, as appellee claimed that turn-

buckles were not efficient tools to accomplish this work. This refusal led to the altercation which resulted in plaintiff's termination. [Tr. pp. 80-81.] However, in view of the trial court's findings of fact and conclusions of law,* the effectiveness of using turnbuckles, as well as the other mentioned tools, for joining the tower sections, is immaterial. This results from the trial court's findings and conclusions that regardless of appellee's inclination not to use turnbuckles, and regardless of whether his foreman, Tam's, instruction to use turnbuckles was the most efficient manner of construction, nevertheless, it was appellee's duty to obey the order to get the turnbuckles and use them, the words of this finding being:

> "It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles. He made no real effort to do that, and he didn't intend to do it. . . . I must find that the order to proceed with construction as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination." [Tr. pp. 266-267.]

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*By written stipulation of counsel [Tr. p. 30], the decision of the Court announced from the bench on Tuesday, October 9, 1945, as taken down and transcribed by the stenographic reporter, is deemed to be and constitute the findings of fact and conclusions of law in this action without necessity for a separate statement thereof and without necessity for the Court's signing the same. Thus, the reporter's transcript of the Court's oral decision [Tr. pp. 264-270] constitutes the findings of fact and conclusions of law of the trial court in this action.

While, as shown above, the question of fact as to whether turnbuckles were the most efficient tool to use on this particular construction job is entirely immaterial, nevertheless, the facts involved in plaintiff's refusal to use the turnbuckles on July 9th, which led up to the altercation resulting in this litigation, have a bearing upon the points presented in this appeal as will hereinafter appear.

Appellee's version of that dispute is substantially as follows: He first testified that a few days before July 9th he suggested to Tam that a truck be obtained to carry the boilermakers' tools and equipment from the site of the smokestack job where he had recently been working to the bubble tower job where he was then assigned. Tam then told appellee to take some of his Arabs over to get the turnbuckles and other equipment and said "you don't need a truck for that." Appellee protested that the equipment was rather heavy to carry that distance and repeated his suggestion that a truck be obtained. Tam replied that a truck was not needed and appellee testified, "therefore, we didn't go get the stuff because it was too heavy. It was out of reason to carry it." [Tr. p. 71.] At this point appellee's counsel "refreshed" appellee's memory by reading to him his testimony given at a prior deposition and asked him whether that testimony was true. The answer, being in the affirmative, appellee's story was thereby changed to the extent that Tam, instead of saying that a truck was not needed, put the matter off by saying: "We will see about that later."

The turnbuckles that appellee was ordered by Tam to obtain and bring to the bubble tower site were then located "a long block and a half away from the bubble tower site," according to appellee's testimony. [Tr. p. 93.] These same turnbuckles had been at the bubble tower site

when appellee first went to work at that location and had been moved to the smokestack site about the time appellee had been assigned to that job in the month of June. [Tr. p. 91.] These turnbuckles weighed between ten and twelve pounds each, with a swivel screw of one inch in diameter, according to appellee's testimony. [Tr. pp. 95-96.] Two turnbuckles were all that appellee was required to obtain and bring to the bubble tower site on this occasion. [Tr. p. 95.] Appellee had a crew of several Arab helpers whose duty, among other things, was to carry tools such as these turnbuckles. [Tr. pp. 90, 96.]

Then on July 9th, Tam sent word to appellee to work an hour overtime on that day to put another section of the bubble tower in place. A crane with the necessary operators and riggers was to be available during that hour, but was to be transferred to another job the following day. Appellee remained on the job during the overtime period but testified that all his Arab assistants left at the regular quitting time. Appellee then, with the assistance of the crane, caused the new section of the bubble tower to be moved up to the already assembled sections and secured it with two key plates for an overnight hanging. All this work, to the extent that it involved boilermaker's duties, was done by appellee alone. He had been swinging a twelve-pound hammer against the key plates and was tired and perspiring freely. His work was completed, thus releasing the crane, and he was about ready to leave. At this point Tam approached and asked: "Where in hell are the turnbuckles?" Appellee said: "Tam, we never could—we never have been able to use turnbuckles on this. It is a hopeless case, hopeless effort. I have got it secured this way. We can finish it in the morning with key plates. It is up as close as we

can get it. We can release the crane. It can go ahead with its other work." Tam said: "I told you to get some turnbuckles." Appellee replied: "That was three or four days ago. I am not exactly a pack horse or a mule. I sent my coolies after them and they couldn't find them. I asked you several days ago to give me a truck so I could go down and haul up the turnbuckles and other equipment which we needed very bad." Appellee's testimony on direct examination continues:

> "So, one word led to another and I was rather hot and exhausted under the conditions of the weather and the work I was doing by myself, so he (Tam) said, 'you are fired.' The only thing I knew to do was to hit the fellow offhand and I didn't do that. I intended to, but I didn't do it. So I went over to Mr. Einer, the inspector, and I said, 'Mr. Einer, it has been a pleasure to work for you.' * * * He was a swell fellow and we had gotten along beautifully all through the process of building the bubble tower, which was very intricate and very detailed and there had never been a harsh word between us under any conditions. * * * So he said to me, he said, 'what is the matter with Tam?' * * * 'can't he get away and leave people alone and let them do the work?' * * * 'Doesn't he know when he is well off as a foreman?' I said 'I don't know.' * * * 'You heard the argument.' * * * 'At least you saw part of it.' So I went over to wait for a bus to haul me back to Awali." [Tr. pp. 60-64.]

Appellee testified further on direct examination:

> "Q. When Mr. Tam arrived did he inspect the bubble tower section that you had just put up? A. Yes, he looked at it.
>
> * * * * * * * *

Q. By Mr. Sheridan: Did Mr. Tam order you to do anything other than what you had done when he arrived at the scene?

* * * * * * * *

The Witness: He ordered me to go get the turnbuckles. I told him that we had it all set—that it was not necessary, and he said, 'well where are the turnbuckles?' And I said, 'They are down at the smokestack,' and from then on more or less the argument became heated and he eventually told me I was fired." [Tr. p. 81.]

Tam's version of the dispute with appellee was substantially as follows: On the morning of July 9th and again in the afternoon he told appellee to work an hour overtime that day and to get everything ready for assembling the next section. [Tr. pp. 128-129.] The crane was needed on another job in the morning and appellee was instructed to get the new section up close enough so the crane could be released and the end of the section could be "faired up" later. Tam approached the job site during the overtime period and his testimony as to the ensuing events is as follows:

"I come back about 2:30 and the crane had just taken a lift on the tower. Probably it was within an inch or inch and a half of the shell and Mac [appellee] was just standing there. The riggers were standing there and I said, 'Well, what is the matter here? Let us get going here.' I said, 'We have to release this crane in the morning.' I said, 'Where are the turnbuckles?' He [appellee] said, 'I am no work horse.' Then he started blowing off.

Q. What else did he say? A. He said, 'to hell with you.'

Q. What else did he say if you can remember? A. He said, 'you ought to have a truck to get that stuff.' I said, 'you don't need a truck to get turnbuckles.' I said, 'they are right down there by the stack in a box.'

So he says, 'I am getting tired of taking your sass,' or some such thing, 'I am quitting.'

So I was standing below the staging and I started to walk away and he came out there and gave me a shove and put his dukes up and started cussing. I told him, I said, 'Be careful, McDonald, and use your head.' He did blow off, and I said, 'Now, you are through working for me.' I said, 'You are through now,' so he went off to the office, I guess." [Tr. pp. 132-133.]

Tam further testified positively that appellee's Arab helpers were present on the job during the overtime period [Tr. p. 134] and that after appellee left he took some of these Arab helpers of appellee down to the smokestack, got the turnbuckles, brought them back and fastened them in place on the bubble tower and had the section in place by 3 o'clock. [Tr. pp. 133-139.]

Iner Ahrendt, the inspector, referred to by appellee, testified that he was near by when the argument between appellee and Tam started but that he then walked away, his orders being "to stay clear of those things" and that he "was quite a way from them and so exactly what was said I did not hear." [Tr. pp. 257-258.] Ahrendt denied

making the statements attributed to him by appellee in his testimony [Tr. p. 262] and stated that there was a crew of Arab helpers present during the argument. He said:

> "Immediately after that [the argument] Tam walked up to this other job and got the turnbuckles and brought them back. He took some coolies along with him, I believe." [Tr. p. 263.]

Appellee's testimony as to the events following his altercation with Tam was substantially as follows:

After the altercation he went to the nearby field construction office to wait for a bus back to camp and while waiting there got into a conversation with Harold Vessels, Assistant Project Manager, and J. Roy McAuliffe, Project Manager. Appellee explained to them that he had just had an altercation with Tam, explaining its details, and he then requested to be transferred to another job. They told him they would investigate the circumstances and requested that appellee report back to them the following day for an answer. [Tr. pp. 168-171.]

Appellee reported back the following day and met the General Boilermaker Foreman, Ed Gratz, who asked appellee why he had gone to the office instead of first reporting the matter to him, Gratz. In response, appellee stated that he had merely gone over to the office to wait for a ride and that McAuliffe and Vessels had inquired what he was doing there and he told them the situation, appellee then stating to Gratz, "Well, forget about it, I am not here to argue. I am waiting for somebody else." In reply Gratz said, "Well, you are fired. You are through. You are finished." [Tr. p. 173.]

The Project Manager, McAuliffe, and his assistant, Vessels, did not approve the action of the General Boilermaker Foreman, Gratz, and did not accede to appellee's request for a transfer to another work assignment, but, on the contrary, ordered him back to work under the supervision of Foreman Tam. Appellee was unwilling to do this, refused to report back to Tam, and, instead, went back to camp at Awali. [Tr. pp. 171-175.] Plaintiff left Bahrein Island shortly thereafter and returned to his home in Long Beach, California.

Under the terms of the contract, appellant withheld a balance of salary then earned by appellee and applied it to the cost which appellant advanced for transporting appellee back to his home. The salary withheld was not sufficient to reimburse appellant for these charges. [Tr. p. 183.]

The present suit was instituted by appellee to recover damages for breach of contract measured by the balance which would have been earned by appellee less remuneration for other services. Appellant resisted the claim for damages and counterclaimed for the balance of the charges for transporting appellee back home.

Trial was had upon all issues in the case before the court without a jury. The court made its findings of fact and conclusions of law* and entered judgment for appellee for the amount of one month's salary plus appellee's transportation expenses to his home. The findings were that

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*See footnote, *supra*, p. 6.

appellee had deliberately disobeyed his foreman and was guilty of insubordination; that the project manager and his assistant elected to overlook the insubordination and ordered him to return to work under Foreman Tam; that Tam had created a condition rendering it impossible for appellee to continue work under Tam's supervision; and that by insisting that appellee return to work under Tam, appellant thereby made it impossible for appellee to continue in the employment, and he was thereby discharged without cause. [Tr. pp. 264-270.]

A copy of the trial court's findings of fact and conclusions of law and the stipulation in connection therewith, are attached hereto as an appendix for the convenience of this court.

Specification of Errors Relied Upon by Appellant.

1. The trial court erred in finding that Foreman Tam created a condition rendering it impossible for appellee to perform further under Tam's supervision; said finding is wholly without support in the record and is inconsistent with the trial court's prior finding that appellee made no real effort to obey and did not intend to obey Tam's instructions and that such disobedience was equivalent to insubordination.

2. The uncontradicted evidence establishes that appellant's refusal to transfer appellee to another job and the instruction for him to return to work under the supervision of Foreman Tam was consistent with appellant's rights under the employment contract, did not amount to wrongful discharge, and the trial court's findings and conclusions to the contrary are wholly without support in the record.

3. The court's finding that appellant's conduct made it impossible for appellee to perform further the employment contract is wholly without support in the record.

4. The uncontradicted evidence is that appellee voluntarily abandoned his rights under the contract by refusing to report for work as instructed by appellant and the trial court's findings and conclusions to the contrary are wholly without support in the record.

5. If appellee was discharged by appellant, appellee's refusal to obey the instructions of his superiors constituted sufficient cause for such discharge, and the court's findings and conclusions to the contrary are wholly without support in the record.

ARGUMENT.

I.

The Court's Finding That Foreman Tam Created a Condition Rendering it Impossible for Appellee to Further Perform Under Tam's Supervision Is Wholly Without Support in the Record and Is Inconsistent With the Court's Prior Findings That Appellee Made No Real Effort to Obey and Did Not Intend to Obey Tam's Instructions and That Such Disobedience Was Equivalent to Insubordination.

The trial court found that appellant did not accept the action of either Tam or Gratz in attempting to discharge appellee, but that appellant instructed appellee to return to work under the supervision of Foreman Tam. Continuing, the court found that "he (appellee) was advised to go back to work, but under the immediate and direct supervision of the man that the court must find, from the situation as it is disclosed by the evidence here, created an impossible condition and he could not have worked there and would not have been able to continue long because of the tremendous bitterness that had been engendered because of the encounter of the day before." [Tr. pp. 268-269.]

Appellant respectfully contends that there is absolutely nothing in "the situation as it is disclosed by the evidence here" to support the court's finding that Leon Tam created an impossible condition.

(a) Appellee Was Bound to Obey the Lawful Instructions of Foreman Tam.

By the terms of the employment agreement between appellant and appellee [Tr. pp. 43-49], appellee expressly agreed

> ". . . to serve Company as a Boilermaker (or in such other capacity as Company may from time to time require) in Company's Zone of Operations for a period of eighteen (18) months from the time Employee shall report for duty at Bahrein, . . ." (Clause 1).

> ". . . to comply with and abide by all general regulations and instructions from time to time issued by Company, or by The Bahrein Petroleum Company Limited, including those governing hours and conditions of work, *and to obey all lawful orders given by the Company, its Manager, or other duly authorized person or persons.*"* (Clause 6.)

Having in mind appellant's organizational structure on this construction job, as set forth in the second paragraph of the "Statement of the Case" hereinabove, it is established without conflict in the evidence that appellee was under a duty to obey his immediate foreman, Leon Tam, in all lawful orders given by Tam on behalf of the Company. Tam's orders for appellee to obtain turnbuckles and use them on the bubble tower work on July 9th, and also several days prior to that date, was a perfectly reasonable and lawful order. This matter is

*Italics added here and elsewhere in this brief unless otherwise stated.

put at rest by the trial court's express finding on the precise point, as follows:

> ". . . it was still his duty, I find, to obey the order in reference to getting these turnbuckles." [Tr. p. 266.]

(b) Appellee Deliberately Refused to Obey Tam's Lawful and Reasonable Instructions.

Appellee deliberately and wilfully refused to obey Tam's instructions, given on at least two occasions on and shortly before July 9th, to obtain and use turnbuckles in assembling the sections of the bubble tower that appellee was working on, as shown both by the testimony of appellee himself and also by Tam's testimony. [Tr. pp. 71, 81, 128-129, 132.] This matter is likewise set at rest by the trial court's specific finding to this effect, as follows:

> "I must find that the order to proceed with construction, as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination."

and further

> "He [appellee] made no real effort to do that [obtain the turnbuckles], and he didn't intend to do it, . . ." [Tr. pp. 266-267.]

(c) The Disobedience of Appellee to Tam's Instruction Was the Immediate Cause of His Altercation With Tam.

It is manifest from the record that appellee's disobedience of Tam's orders was the immediate and proximate cause of the altercation between appellee and Tam on the afternoon of July 9th. This is established by appellee's

own testimony of the exact sequence of events at approximately 2:30 P.M. on July 9th [Tr. p. 62] and also by the testimony of Leon Tam. [Tr. pp. 132-133.] Appellee's own version of these events is that when Tam arrived at the bubble tower site at approximately 2:30 P.M. only July 9th, he said to appellee, "I told you to get some turnbuckles," and appellee replied, among other things, "I am not exactly a pack horse or a mule" and "So, one word led to another and I was rather hot and exhausted under the conditions of the weather and the work I was doing by myself, so he said, 'You are fired.' The only thing I knew to do was to hit the fellow offhand and I didn't do that. I intended to, but I didn't do it." [Tr. pp. 62-63.] No one can dispute the fact that had appellee not refused to obey the instruction to obtain the turnbuckles, the altercation would not have resulted.

(d) Assuming But Not Conceding That an Impossible Condition Resulted From the Altercation Such Condition Was Created by Appellee and Not by Tam.

There is no evidence in the record that as a result of the altercation between appellee and Tam on the afternoon of July 9th, it was impossible for appellee to return to work under Tam's supervision on the morning of July 10th as he was instructed to do. And at a later point in this brief it will be argued that no such impossibility in fact existed.

But even if it were assumed that it was impossible for appellee to return to work under the supervision of Tam, there is no conceivable basis for the Court's conclusion that such impossibility was created by Tam. As a foreman, Tam, obviously, was under certain obligations

to appellant. One of those obligations was to instruct appellee with reference to the manner in which the latter was to do his work and appellee was obliged to obey those instructions. Tam did issue instructions. Appellee refused to obey and solely as a result of such disobedience an argument ensued. Under these circumstances how can it be said that Tam created an impossible condition?

Clearly, if it be assumed that an impossible condition resulted from the altercation, such condition was created by appellee and not by Tam. Appellee, by his disobedience, caused an argument. The argument resulted in the so-called impossible condition. Therefore appellee caused the impossible condition, if one existed.

(e) WHERE ONE PARTY TO A CONTRACT RENDERS FURTHER PERFORMANCE IMPOSSIBLE HE CANNOT ENFORCE PERFORMANCE BY THE OTHER.

Assuming, but not conceding, that it was impossible for appellee to return to work under the supervision of Tam, it has been demonstrated above that such impossibility was created by appellee. Under these circumstances on well settled authority appellee would have no right to insist on performance of the employment contract by appellant.

Taylor v. Sapritch (1940), 38 Cal. App. (2d) 478, 481; 101 P. (2d) 539;

Ray Thomas, Inc., v. Cowan (1929), 99 Cal. App. 140; 277 P. 1086.

On the contrary appellant would have the right to recover from appellee by reason of his creating the impossible condition.

Pacific Venture Corporation v. Huey (1940) 15 Cal. (2d) 711, 717; 104 P. (2d) 641.

II.

The Uncontradicted Evidence Establishes That Appellant's Refusal to Transfer Appellee to Another Job and Instructing Him to Return to Work Under the Supervision of Foreman Tam Was Consistent With Appellant's Rights Under the Employment Contract, Did Not Amount to a Wrongful Discharge, and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

The trial court apparently took the position that appellee's insubordination and the resulting altercation with Tam gave appellant the right to exercise one of only two alternatives, *i. e.,* either to fire appellee or transfer him to another job. With all due respect appellant contends that the court erred in taking this position.

(a) Resumption of Appellee's Duties Under the Supervision of Tam Did Not Involve an Impossibility.

Certainly there is nothing in the record even remotely tending to indicate that it was physically impossible for appellee to return to work under Tam's supervision. And that was all he was instructed to do on the morning of July 10th, *i. e.,* report to Tam for work as usual. If he had merely reported to Tam he would have fulfilled the instruction given to him by Vessels. If he had done that and if Tam had deliberately assumed a hostile attitude to a degree rendering it impossible for appellee to perform his work it would have been time enough for appellee to apply for transfer to another job. But there is no evidence that such a situation would have resulted and appellee stands guilty of deliberately refusing to take

the first simple step toward purging himself from his insubordination.

The only conceivable basis for a conclusion that an impossibility existed would be some substantial evidence of a threat to appellee's personal safety if he did report to Tam for work. But the record does not disclose any substantial evidence of the existence of such a threat. The record only discloses that at the end of a working day and under working conditions which appellee described [Tr. p. 61] as "intense heat and high humidity and very, very depressing" the argument between appellee and Tam reached a point where both men squared off and there was at that moment, in the language of the court, a threat of "great physical violence to one or both of these parties." But no blows were struck and the court found that at that point the good judgment of these two men came into play and a physical encounter was thereby avoided. [Tr. p. 267.] There is nothing in such a situation which would support a conclusion that after a full night's "cooling-off" period Tam's good judgment would have suffered a relapse or that appellee would have been in any physical danger. Project Manager McAuliffe investigated into the circumstances of the dispute sometime prior to appellee's refusal to report on July 10th and McAuliffe found that Tam was not opposed to appellee's returning to work as usual. [Tr. pp. 193-194, 197, 204, 215.] The only thing required of appellee under these circumstances was that he should return to work and continue to exercise his good judgment, this time in the direction of obedience to the instructions of his superior. Such conduct would undoubtedly have been a wholesome start toward peaceful conditions of employment.

(b) The Express Terms of the Employment Agreement Required Appellee to Return to Work as Instructed.

As demonstrated above under the express terms of the employment contract it was appellee's duty to "obey all lawful orders given by the Company, its Manager, or other duly authorized person or persons." [Tr. p. 45.] The order for appellee to return to work was issued by the authority of Project Manager McAuliffe [Tr. p. 194] through Assistant Project Manager Vessels. [Tr. pp. 175, 253.] There was obviously nothing illegal about this order and nothing to prevent appellee from obeying it.

(c) The Mere Fact That Obedience to Orders May Be Personally Unpleasant Is No Excuse for Disobedience.

A return to work under the supervision of Tam whose authority he had flagrantly disregarded was doubtless a distasteful prospect to appellee. As seen above, however, appellee had only himself to blame for this situation. And regardless of who is to blame for a situation rendering an employee's duty unpleasant it is well established that such unpleasantness is no excuse for willful refusal to perform.

As stated in *Fraser, Master and Servant* (p. 71):

> "Of course the master cannot compel him to obey further than has been agreed between them, or than is consistent with law; but at the same time the servant is not entitled to enter upon a minute measurement of the exact limits of his service, or to weigh in too nice a balance the precise kind and quantity of labor which he can in strict law be compelled to perform. While the servant will be

protected from harsh treatment, on the one hand, it is, on the other, incumbent upon him to render a cheerful and ready obedience in all points which, in the judgment *boni viri,* cannot be considered any departure from the contract."

In the leading California case of *May v. New York Motion Picture Corp.* (1920), 45 Cal. App. 396; 187 P. 785, it is said (45 Cal. App. 404):

"The master has the right to make a reasonable order though he knows it will be distasteful to the servant, and even though he gives the order with the expectation that the servant will leave his employ rather than obey."

III.

The Court's Finding That Appellant's Conduct Made it Impossible for Appellee to Further Perform the Employment Contract Is Wholly Without Support in the Record.

Appellant is firmly convinced that what has been said above amply demonstrates that Tam did not create a condition rendering it impossible for appellee further to perform under Tam's supervision and that the order of McAuliffe and Vessels for appellee to return to work was wholly consistent with appellant's rights under the contract. This being so there remains for consideration the court's finding that

"this order of Mr. Vessels and Mr. McAuliffe created a situation that made it impossible for the plaintiff to further perform, and could result in only one thing, and that is a termination of the contract." [Tr. p. 269.]

Appellant respectfully contends that said finding is wholly without support in the record.

(a) The Only Logical Inference to Be Drawn From the Record Is That Appellant Made it Possible for Appellee to Resume Performance in Spite of His Deliberate Disobedience.

Immediately following the altercation between appellee and Tam there occurred the conversation between appellee, Vessels and McAuliffe in the course of which appellee stated his version of the dispute and asked to be transferred to another job. [Tr. pp. 65-66.] McAuliffe agreed to investigate the affair, although mentioning the policy of the Company against transferring the workmen around from one foreman to another at the request of the men since such a practice would result in losing authority over the men. [Tr. p. 193.] He ordered appellee to report back to Vessels on the following morning for an answer. [Tr. p. 193.] When appellee reported back and after his conversation with Gratz, whose attempt at discharge the trial court found was not accepted by appellant [Tr. p. 268], Vessels ordered appellee to return to work under the supervision of Tam. The record shows that this order was made plain to appellee but that he nevertheless refused it, left the jobsite and returned to his quarters in the main camp at Awali where he went to bed. [Tr. p. 68.]

The order for departure from the island under these circumstances was of course strictly within the rights of appellant as expressly provided in clause 11 of the contract. [Tr. p. 46.]

On the basis of these uncontradicted facts appellant respectfully contends that the trial court was in error in its conclusion that appellant made it impossible for appellee to further perform the contract. On the contrary the record compels the conclusion that appellant did everything within reason to help appellee in spite of himself. But appellee would not be helped.

IV.

Appellant Voluntarily Abandoned His Rights Under the Employment Contract by Refusing to Report for Work as Instructed by Appellant and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

Appellee demonstrated on the afternoon of July 9th that he had not taken and would not take orders from Tam. He then made a request for transfer to some other job and reported to Vessels on the morning of July 10th, apparently hoping that he would continue in the employment in some other capacity.

(a) Appellee's Willingness to Continue in the Employment Was Subject to the Condition That He Be Transferred to Another Job.

Appellee's disposition toward Tam's authority, as indicated in the altercation of July 9th, his application for transfer to another job, and his refusal to report to Tam on the morning of July 10th is proof to a demonstration of the fact, found by the trial court, that appellee's willingness to further perform the employment contract "was conditioned upon the fact that he would not be directly under the supervision of Foreman Tam." [Tr. p. 268.] He would not work for Tam under any circumstances.

(b) The Condition Upon Which Appellee's Willingness to Continue in the Employment Was Based Was Wholly Unwarranted and Was the Equivalent of Resignation.

As demonstrated above appellee had expressly promised to serve appellant as a boilermaker or in such other capacity as appellant might require and to obey all lawful

orders given by appellant, its manager or other authorized person.

Project Manager McAuliffe issued instructions for appellee to return to work under the supervision of Tam. Clearly there was nothing illegal about this instruction and therefore under the express terms of the contract appellee was bound to obey. But appellee was unwilling to obey the instruction given. He attached a condition to his willingness and the condition was not authorized by any provision in the contract or by law, as shown below.

Appellee's willingness to continue in the employment was subject to a condition precedent, to wit, that he be transferred to another job. He in effect said: "Unless I am transferred, I will quit." And since he had no right to insist upon the unwarranted condition, he in effect resigned at the moment he demonstrated such insistence. This may have occurred, and in view of all the circumstances it probably did occur, at the moment he left Tam on July 9th and asked Vessels and McAuliffe for a transfer and at the very latest it occurred on July 10th when appellee refused to report to Tam for work. That demonstration amounted to a total breach of the contract by appellee.

Whether or not appellee's manifestations of an unwillingness to report to Tam for work in themselves amounted to a resignation, there is no doubt that his actual refusal to report to Tam constituted a resignation. At that point he was clearly required to report to Tam but he chose rather to return to his quarters at Awali. By his conduct, if not by words, appellee clearly said, "I will not report for work as instructed; I quit." This being true it follows that there can be no recovery.

The case is almost identical with the situation presented in *Phelps v. Fuchs & Lang Mfg. Co.* (N. J. 1911), 81 Atl. 729, wherein Phelps the employee, had agreed to serve under the supervision of one Ford. Phelps had an altercation with a shipping clerk who disputed his authority. When Phelps reported the matter to Ford the latter sustained the shipping clerk whereupon Phelps said "I will quit." Later Phelps went to higher authority for the avowed purpose of having Ford overruled. He failed in this purpose and in refusing him any relief in his action for damages for breach of the employment contract the New Jersey Court said:

> "having failed in this purpose, he did not accept the situation and return, or attempt to return, to his work, but remained away. All that Ford did was to insist that the plaintiff had quit, and if such insistence was justified by plaintiff's words and conduct, and we conclude it was, no illegal discharge could be implied from facts which conclusively demonstrated that the plaintiff had abandoned the service."

In *Wiley v. California Hosiery Co.* (1893), 3 Cal. Unrep. 814; 32 Pac. 522, the employee, after a dispute with the employer, received a letter from the employer offering to continue the service if the employee would comply with instructions. This he refused to do and the court said (3 Cal. Unrep. 821):

> "That request being reasonable, under the circumstances, we are led to conclude that the plaintiff voluntarily, and without sufficient reason, quit the defendant's employ."

See also, Restatement of Law of Contracts, §§ 314, 317, 318.

V.

Assuming That Appellee Was Discharged, His Refusal to Obey the Instructions of His Superiors Constituted Sufficient Cause for Such Discharge and the Court's Findings and Conclusions to the Contrary Are Wholly Without Support in the Record.

Appellant tried the case in the court below on the theory that appellee resigned from the employment or, in the alternative, that if he was discharged there was ample justification therefor. Appellant believes that the argument preceding this point fully supports the theory of resignation. Appellant desires, however, to present its argument on the alternative theory in order that the case may be fully presented.

(a) Under the Express Terms of the Contract and as a Matter of Law Apart From the Contract There Was Sufficient Cause for Appellant to Discharge Appellee.

Under the express terms of the contract, in view of the facts, and *the court's finding of deliberate insubordination* [Tr. p. 267], appellant clearly had the right to discharge appellee. The contract, in clause 10 [Tr. p. 46] expressly provides:

> "Company may summarily terminate Employee's service hereunder at any time for Cause, such as insubordination, * * *."

and in clause 12(b) [Tr. p. 47] the contract provides:

> "In the event that Employees services hereunder shall be terminated by the Company for Cause during the Employee's full term of service hereunder * * * Company shall be under no obligation to pay,

or to contribute in any manner to the expenses of the Employee's passage to his Home nor to pay Employee any salary for the time consumed in returning thereto or for any other period beyond the date of such termination. Company may, at its discretion, purchase for Employee, at Employee's expense, tickets or vouchers good for Employee's return passage or any portion thereof, and Company is hereby authorized to withhold and retain from any sums due from Company to Employee the amount necessary to recover the cost of any tickets or vouchers so purchased."

Apart from the express terms of the contract, the law is clear that an employer may discharge an employee for a single act of disobedience. The leading California case on the subject is *May v. New York Motion Picture Corp.* (1920), 45 Cal. App. 396, 187 Pac. 785. The rule is therein stated as follows (45 Cal. App. 403-404):

> "'Wilful' disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty—a breach of the contract of service; and like any other breach of the contract, of itself entitles the master to renounce the contract of employment. According to the decided preponderance of authority, a single act of disobedience to a specific, reasonable order from the master to the servant is, as a matter of law, a violation of duty that justifies the master in discharging (Labatt's Master and Servant, 2d ed., sec. 291, p. 897); and whether actual injury has resulted to the master's business is wholly beside the mark."

See, also:

Bank of America v. Republic Productions (1941), 44 Cal. App. (2d) 651, 654, 112 P. (2d) 972.

And in *Forsyth v. McKinney,* 8 N. Y. S. 561, 562, the court said:

> "It is the right of the employer to establish rules. If a workman, on seeing these rules, is dissatisfied with them, he need not accept the employment. If he accepts it, however, he must obey the rules. If he disobeys the rules, he breaks his part of the contract, because it is a part of his contract to obey them. *The plaintiff in this case is not suing to recover for work which he has performed. He is suing for a breach of the alleged contract to employ him for a year. He must then show that he has performed his part of the contract. If he has broken his side, he cannot compel the defendants to keep theirs, or recover damages if they do not continue to observe a contract which he has broken."*

(b) The Cause for Discharge Was Not Condoned.

The court apparently took the position that when McAuliffe, in the conversation of July 9th, instructed appellee to report back to Vessels on the morning of July 10th, McAuliffe thereby elected to condone appellee's refusal to obey Tam's instructions. The court found that McAuliffe and Vessels thereby "elected, on the contrary, to overlook what had occurred, and directed plaintiff to report back for work the next day." With all respect, appellant contends that this finding was clearly erroneous and is without support in the record.

The altercation between appellee and Tam preceded the conversation between appellee, Vessels and McAuliffe only by enough time to permit appellee to walk from the bubble tower to the nearby bus station. Obviously, McAuliffe had not even heard of the altercation before that time, much less Tam's version of it. And it is fantastic to

assume that, without knowing whether or not insubordination existed, McAuliffe could elect to condone it. Election involves an informed choice. And since McAuliffe did not have the necessary information, he was in no position to elect. The rule is stated in 39 Corpus Juris, Master and Servant, as follows (Sec. 89):

> "A master who, *after knowledge* of a material breach of contract on the part of his servant, continues to accept his services without reasonable cause for delay in discharging him, is presumed to have waived the breach, and will not be allowed to set it up afterwards. Although the conduct of the master in continuing to accept the services of the servant *after the knowledge* of a material breach of contract on the latter's part is *prima facie* condonation of the offense in the absence of any explanation, it does not, as a matter of law, establish a waiver of his right to discharge him, *and the master does not waive his rights by postponing action until he is fully satisfied of the servant's guilt.*"

It is clear from the record that McAuliffe's only purpose in requesting appellee to report to Vessels on the morning of July 10th was to give himself time to investigate the circumstances of the case in order to make an intelligent decision. Appellee's testimony was that McAuliffe listened to his version of the dispute with Tam and replied to his request for a transfer as follows [Tr. p. 170]:

> "Well, we are going to stop this transferring, put a stop to it. *We will see.* You come back out in the morning and report to * * * Harold Vessels."

McAuliffe testified as follows: [Tr. p. 193]:

> "I told him that just on the spur of the moment I would not give him an answer; that our policy was strongly objecting to transferring men around because we have no authority on the job and we wouldn't get our work done. We were over there to do a certain job and a certain foreman would be assigned to certain work and the men were assigned to the foremen, and in order to have an organization they would have to work that way, but I would not give him a yes or no answer. *I would investigate the circumstances. So I told him I would check it up and asked him to come back the next day.*"

Under these circumstances it is clear that McAuliffe's instruction of July 9th could not have amounted to condonation and, under the rule of law above set forth, in view of appellee's refusal to report to Tam, neither did Vessel's instructions on the morning of July 10th amount to a condonation.

(c) The Existence of Sufficient Cause for Discharge Followed by an Actual Discharge Is a Complete Defense.

Appellant did not expressly discharge appellee, but the court found that by a course of conduct it accomplished the same result. Assuming, but not conceding, this to be true, it nevertheless results that appellee has no cause of action.

An employer, in discharging an employee, need not show that he in fact acted upon some proper ground of dismissal. It is sufficient if any ground for the discharge existed at that time. I Labatt, *Master and Servant*, Sec. 189. In fact, it is not even material whether the employer

knew of grounds which in fact existed at the time of discharge. *Re Milwaukee Motor Co.* (C. C. A. 7), 246 Fed. 671. Or he may justify a dismissal by relying on a ground different from that assigned at the time of discharge. *Von Heyne v. Tompkins* (Minn.), 93 N. W. 901. See 35 American Jurisprudence, *Master and Servant*, Sec. 37.

There was ample cause for the discharge of appellee in this case, consisting in his disobedience to the orders of Tam on and prior to July 9th and his disobedience to the orders of Vessels on the morning of July 10th. Therefore, if he was discharged, however the discharge was accomplished, appellee has no cause of action.

Conclusion.

For the foregoing reasons, it is respectfully urged that the trial court erred in entering judgment for appellee, and appellant prays that said judgment be reversed, with instructions to enter judgment for appellant.

Respectfully submitted,

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Jackson W. Chance,
Attorneys for Appellant.

Leo A. Deegan,
Of Counsel.

The Court: I am not going to attempt to detail the evidence, as I see it, nor to summarize it at length, except as I shall make some reference to it in making a disposition of this controversy.

The first matter that we must give consideration to, naturally, is this written contract of employment. Ordinarily we do not have in a situation of this kind, if it were domestic rather than foreign service, a written contract of employment. I daresay that almost 99 per cent of employment contracts between an individual and a construction corporation are on an oral basis. But here the employer was taking the employee many thousands of miles from his home in a period of war, when travel was much restricted, and when it was extremely expensive, and when only such movements and such activities as are indicated by this contract were engaged in by reason of the part which they played in the war effort itself. This contract of employment undoubtedly was one that was drawn by the employer, and then signed by it and the employee here. Being drawn by the employer, of course, it cannot be interpreted favorable to the employer, in any interpretation of it and its terms. The three paragraphs that bear directly upon the issues here are the covenants contained in paragraphs 6, 9 and 10. 6 recites the obligations that the employee assumes, and 9 has a special provision for the termination of the contract by [278] either of the parties, and 10 provides for a termination of the contract and liabilities thereunder by the employer, if they should elect to do so and if they have a sufficient cause for doing so.

It is the contention of the plaintiff that without cause he was discharged and the contract was breached, and

that the liability arises for the loss that he sustained during the remaining period of this contract, which was an 18 months contract, as I recall it. Performance had proceeded for about a month, or a little longer period of time, under the contract.

The defendant contends that the plaintiff summarily ceased to perform under the terms of the contract, and, therefore, is not entitled to any recovery.

In attempting to arrive at what the actual facts were in this case, I cannot, of course, adopt the testimony of either the plaintiff or the defendant to the exclusion of the other, because there is nothing in this situation that would indicate to the court that all truth lies on one side and all error on the other. I must attempt, in so far as it is humanly possible to do so, to visualize the situation as it must have occurred 10,000 miles away out there in the Mediterranean Ocean, on some little island, where a terrific and hurried effort was made to bring into future utilization that great essential in carrying on the war, additional [279] petroleum supplies.

It is totally beside the question here as to whether Mr. McDonald, the plaintiff in this case, or Mr. Tam, his immediate foreman were the better qualified to judge as to the means and methods and procedures in construction, and I am not going to attempt to determine that, other than to say in passing that Tam must have possessed some of the essential qualifications for this rather complex construction, as well as did the plaintiff, Mr. McDonald.

It was Mr. McDonald's duty, whether he was so inclined or not, and whether the order that Tam gave him was consistent with the most expeditious and efficient manner of construction, it was still his duty, I find, to obey the order in reference to getting these turnbuckles.

He made no real effort to do that, and he didn't intend to do it, and, certainly, if this were not at a place far distant from this country and under the situations that here prevailed, he committed an act that would have been the basis of a summary cancellation of the contract and all liabilities by the employer.

I must find that the order to proceed with construction, as given by Foreman Tam, was sufficiently within his rights to give so that disobedience was equivalent to insubordination. And I do find that Tam after this altercation,—that the altercation was not a mere passing difference, it [280] was one that at the moment threatened great physical violence to one or both of these parties, and but for the good judgment somewhat on both sides it didn't break out into an actual physical encounter, but it resulted in a stiuation, under working conditions such as must have prevailed here, where these two men simply could not live side by side even through working hours thereafter. Tam undoubtedly stated that McDonald was discharged, but he did not have the authority to discharge him and abrogate McDonald's rights under this contract, because he himself occupied a subordinate position.

It appears from the evidence in this case, so far as the workmen were concerned, if there was any authority to discharge, it was with this man Gratz, although he was, in the final analysis, only an employee of the defendant company. But he was the superior of Tam. Certainly, under the procedure there prevailing, when he said a man was discharged, and there is something in the evidence that supports this conclusion of the court, that would be

a discharge except that there be intervention by someone still higher, and the next in authority was a direct representative of the employer, the parties obligated under this contract, and that was Mr. Vessels, and his superior, Mr. McAuliffe, who was the man finally in authority and who made determinations.

I must find that on the evening of July 9th, following [281] the altercation between the plaintiff and Tam, the matter came to the attention of Vessels, and Vessels' superior, Mr. McAuliffe, and they did not elect to find that there was insubordination. They might have done so, and then this court would be confronted with an entirely different problem. But they elected, on the contrary, to overlook what had occurred, and directed the plaintiff to report back for work the next day. He did report back, and then, whether it was before or after his further contact with Vessels and McAuliffe, he contacted Gratz, who was the superior of Tam, and who evidently was the man on this particular job that had some real authority. Gratz advised the plaintiff, and the court has no hesitancy in finding it was not in any friendly tone, that the plaintiff should have brought his troubles to his superior in the boilermakers' organization, that is, Mr. Gratz, and not have gone to the employer, Vessels and McAuliffe. He was angry about that, and then he affirmed what his subordinate, Mr. Tam, had said and done, and said, "You are discharged."

Now, still the parties primarily liable under this contract, through their representatives, didn't accept the action of either Tam or Gratz, except to this extent: when

the plaintiff reported to them, and plaintiff was then perfectly willing to continue to perform under the contract, but that willingness was conditioned upon the fact that he [282] would not be directly under the supervision of Foreman Tam, he was advised to go back to work, but under the immediate and direct supervision of the man that the court must find, from the situation as it is disclosed by the evidence here, created an impossible condition and he could not have worked there and would not have been able to continue long because of the tremendous bitterness that had been engendered because of the encounter of the day before. There is no necessity for me to determine who was the man to blame. So this order of Mr. Vessels and Mr. McAuliffe created a situation that made it impossible for the plaintiff to further perform, and could result in only one thing, and that is a termination of the contract.

Now, the court having found that the defendant—I might have misspoken myself before and said the plaintiff —the defendant by a course of conduct terminated this contract, would it follow, as a matter of law, that the liability would be for the life of the contract or would that termination be in accordance with the rights of the defendant under the contract itself? Certainly, if the defendant had written out formally a notice to this plaintiff that: you will remain on the pay roll for 30 days, and thereafter your services will be terminated, and under the contract it was not required to give any reason whatever, it could not have been more effective than what did occur.

I am forced to the [283] conclusion that, as a matter of law, the plaintiff could not and cannot recover herein more than the one month's wages and his transportation back home. The termination is one that was not formal, yet was within the rights of the defendant to make, and the defendant could make it in the manner in which it did, by logical inference to be drawn from undisputed facts, rather than by the formal procedure as provided by the contract itself, that is, a written notice.

For the reasons stated, I shall find that the plaintiff is entitled to recover herein the sum of such an amount as is measured by one month's compensation, plus his transportation back home, less any advances, if there are any. I do not know how those figures finally work themselves out. Findings of fact and conclusions of law and a decree may be submitted next Monday, if possible. That is our law day.

Mr. Chance: Thank you, your Honor.

The Court: Now, if there is any other feature in connection with this case that I haven't made clear in my offhand memorandum judgment or decision, in disposing of it. I would like counsel to state it now, because I trust that you can get together and work out the findings of fact and conclusions of law without bringing the matter back again for further argument.

Mr. Chance: Will counsel prepare and submit the findings to us under the rules, and we will shorten the time [284] so that they can be presented to your Honor?

Mr. Sheridan: Yes. I will prepare a set and submit them to Mr. Chance.

Mr. Chance: I think we understand your Honor's direction.

The Court: Very well. [285]

[Title of District Court and Cause.]

STIPULATION RE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

It is Hereby Stipulated by and between the parties to the above entitled action, through their respective counsel, that the decision of the court announced from the bench on Tuesday, October 9, 1945, as taken down by the stenographic reporter shall be deemed to be and constitute the findings of fact and conclusions of law in said action and that the reporter's transcript of said oral decision shall, when transcribed (subject to correction of any typographical or other errors contained in the reporter's transcript) constitute the findings of fact and conclusions of law of the court without necessity for a separate statement thereof [68] and without necessity for the court signing the same. A judgment shall be prepared by counsel for plaintiff and presented to the court pursuant to rule of court in accordance with said oral decision. This stipulation shall be without prejudice to the right of either party to urge error in the findings, conclusions, judgment or otherwise.

Dated: October 12th, 1945.

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